

¹ The claimant's discovery deposition taken June 5, 2008 is not part of the evidentiary record.

The sole issue for Board determination is the nature and extent of claimant's disability to his right upper extremity, specifically, the percentage of disability, if any, for claimant's alleged injury to his wrist.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On July 11, 2007, claimant was injured while cleaning and greasing machines called Chirons. He had picked up a panel off the floor to put it back on one of the machines. While heaving it over the coolant tank, he felt "like rubber bands" snapping in his arm and immediately experienced pain. The pain, snapping and cramping was in his right biceps. He noted that his arm went down and kind of snapped his wrist. He then swung the panel around and set it on top of the coolant tank.

Claimant reported the injury to his supervisor and was sent to Mt. Carmel for medical attention that day. An MRI was done which revealed a torn biceps and claimant was referred to Dr. Paul Toma. When Dr. Toma saw claimant he complained of pain about his elbow. Ultimately Dr. Toma performed surgery (a biceps tendon repair, right elbow) on claimant on July 20, 2007.

After the surgery, Dr. Toma saw claimant on July 26, 2007. He saw claimant again on August 6, August 21 and September 4, 2007. It was not until claimant's office visit with Dr. Toma on September 24, 2007, that claimant had complaints of pain and swelling of the right wrist. Dr. Toma sent claimant for an MRI. The MRI showed either an early avascular necrosis or Kienbock's disease of the right lunate. Kienbock's disease is an avascular necrosis or a loss of blood supply to the lunate. Dr. Toma researched this condition and found that the majority of literature indicates that the cause for Kienbock's is idiopathic or unknown, although some of the articles indicate a cause being related to trauma. Regarding the Kienbock's disease, Dr. Toma stated that after he reviewed the literature, since it is for the most part believed to be idiopathic, he didn't relate it back to claimant's injury. But for the Kienbock's disease, Dr. Toma recommended getting an opinion from a hand surgeon.

At the request of claimant's attorney, Dr. Edward J. Prostic, a board certified orthopedic surgeon, reviewed records and examined claimant on February 13, 2008. Claimant gave Dr. Prostic a history of lifting a large, heavy, bulky sheet of metal and feeling a painful snap at the right elbow. Claimant told Dr. Prostic that he ruptured his biceps tendon at the elbow. Claimant complained of a painful condition in his wrist. Dr. Prostic

² The parties did not challenge the 10.3 percent the ALJ awarded for claimant's biceps tendon injury.

concluded claimant had an MRI that was compatible with Kienbock's disease or avascular necrosis of the lunate. Dr. Prostin stated that direct trauma can cause Kienbock's or it can "appear out of nowhere;" either one is possible. Dr. Prostin opined the Kienbock's disease, was either caused or contributed to by the work claimant performed at respondent.

But Dr. Prostin acknowledged that when Kienbock's is caused by trauma, that it is a trauma to the situs of the Kienbock's, in this case claimant's wrist. As to whether Dr. Prostin had an opinion within a reasonable degree of medical certainty whether or not claimant had Kienbock's, he testified that claimant's MRI was compatible with Kienbock's, but not diagnostic. And if claimant had a second MRI that showed similar bone marrow changes, then Dr. Prostin thinks that would confirm the diagnosis. Finally, Dr. Prostin provided a rating of 30 percent of the right upper extremity based on the *AMA Guides*³, fourth edition. That includes a rating for the biceps tendon rupture (15 percent) and for the Kienbock's disease of the wrist (15 percent).

At the request of claimant's attorney, Dr. Lanny W. Harris, an orthopedic surgeon specializing in surgery of the hand, examined claimant on June 17, 2008. He saw claimant on only one occasion. Claimant told Dr. Harris that he was lifting a heavy piece of metal and he was turning it, when he felt a sudden pop and pain in his right elbow. Dr. Harris examined claimant's right wrist. He testified that claimant had some diffuse tenderness and slight swelling. Claimant's range of motion in flexion/extension was about 50 percent of normal. Claimant's grip strength was tested on both wrists. The measurements on the right wrist were abnormal. He had a reduction of grip strength on right wrist.

Dr. Harris testified that he thought claimant had early Kienbock's disease. That opinion was based on claimant's persistent tenderness and the MRI studies that had been done previously. It was Dr. Harris's opinion that the Kienbock's disease was probably caused from claimant's work accident. Dr. Harris stated that the literature states that Kienbock's disease is probably traumatically related, but can spontaneously occur. But Dr. Harris acknowledged that when the literature speaks of traumatically related, that is trauma at the site of the Kienbock's. And Dr. Harris further agreed that claimant's injury was to his biceps and not the wrist or site of the Kienbock's. Dr. Harris agreed that the most definitive test to determine whether claimant had Kienbock's was an MRI.

At the request of respondent, Dr. J Mark Melhorn, a board certified orthopedic surgeon with an added certification in hand and upper extremities, examined claimant on September 2, 2008. Claimant's chief complaint was a painful right wrist. Dr. Melhorn performed an examination of claimant's right wrist. Although claimant did indicate that he had some discomfort or pain with regard to the wrist, Dr. Melhorn concluded the examination would not be diagnostic or supportive of Kienbock's disease with regard to the

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

wrist. Dr. Melhorn had x-rays taken which appeared normal. Consequently, in order to determine whether Kienbock's disease was present, Dr. Melhorn had an MRI done on claimant's right wrist and the left wrist. He had both wrists done for comparison. The MRI of the left wrist showed arthritic changes. The MRI of the right wrist was read as negative for Kienbock's disease. Dr. Melhorn testified that claimant has age-related arthritis in both wrists.

Dr. Melhorn testified that in looking at the MRI, the left wrist actually appears to have more arthritic degenerative changes than the right wrist, yet claimant's right wrist is the symptomatic wrist. Dr. Melhorn concluded claimant does not have Kienbock's disease. Dr. Melhorn further noted that in the case of Kienbock's disease caused by trauma, the trauma has to occur to the wrist itself. Dr. Melhorn concluded that claimant is not entitled to an impairment with regard to the right wrist for a diagnosis of Kienbock's disease, for the reason that claimant does not have Kienbock's disease.

Dr. Melhorn stated that claimant's history was primarily the lifting with regard to feeling the snap or the pop involving the arm, the arm muscles bunching up. His symptoms seemed to originate at the elbow and extend distally, but were not specifically in the wrist until approximately 2 months after the original injury date. Dr. Melhorn noted it is unusual, in claimant's case, that his first complaints regarding the right wrist were approximately 2 months after the original injury. Dr. Melhorn further noted that tends to decrease the likelihood of a mechanism of injury having been the lift or pull with regard to the metal plate that claimant had described.

Dr. Melhorn further opined that it was possible claimant might have an impairment based upon his painful right wrist. And provided a hypothetical that claimant had a history of the onset of wrist pain at the time of the incident then the doctor concluded he would have an additional 1.5 percent impairment to the level of the right arm.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured

⁴ K.S.A. 2008 Supp. 44-501(a).

⁵ K.S.A. 2008 Supp. 44-508(g).

worker's disability.⁶ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.⁷

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Initially, it should be noted that all the doctors agreed that for traumatic Kienbock's disease the trauma must be at the site of the Kienbock's disease. In this case, the claimant's wrist. The difficulty with that causation for the alleged Kienbock's disease is that claimant did not suffer a traumatic injury to his wrist. Secondly, Dr. Melhorn notes that the pain in the wrist would have coincided with the injury if it had been a traumatic injury and in this case the onset of claimant's wrist pain was two months post-injury. Finally, Drs. Harris and Prostic agreed that another MRI would be a definitive way to diagnose the Kienbock's disease and Dr. Prostic further agreed the initial MRI was compatible with but not diagnostic of Kienbock's disease. And when Dr. Melhorn had additional MRI studies done of claimant's wrists, he concluded they were negative for a diagnosis of Kienbock's disease. The Board finds claimant has failed to meet his burden of proof that he suffers from Kienbock's disease in his right wrist as a result of his work-related injury.

The claimant has failed to meet his burden of proof that he suffered a permanent impairment to his right wrist as a result of his work-related accident. Dr. Prostic's provided a rating for claimant's right wrist but it was based upon Kienbock's disease which condition the claimant has failed to prove was either caused by his injury or that he even suffers. Although Dr. Melhorn provided a 1.5 percent rating for the wrist, such rating was based upon a hypothetical that claimant suffered trauma and immediate pain in his wrist at the time of the incident. Dr. Melhorn testified:

Okay, assuming that the pain that he described to me on his office visit of 9-2, 2008 with regard to the right wrist and forearm has the history of the onset of symptoms immediately at the time of the traumatic event relative to the elbow at which time he incurred the biceps tendon rupture, and that his subjective complaints with regard to the right wrist and forearm have been persistent, consistent and currently remain, and were at the level that they were provided on the 9-2, 2008 visit, using the AMA

⁶ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

Fourth Edition Guides, he would have an additional 1.5 percent impairment to the level of the right arm.⁸

Simply stated, the facts establish claimant did not suffer a discrete trauma to his wrist and the onset of wrist pain was not noted until approximately two months after the work-related injury. Consequently, claimant has failed to meet his burden of proof that he suffered permanent impairment to the right wrist as a result of his July 11, 2007 accidental injury. The Board modifies the ALJ's Award to reflect that claimant suffered a 10.3 percent scheduled disability to the right arm.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 10, 2009, is modified to reflect claimant suffered a 10.3 percent scheduled disability to the right arm.

The claimant is entitled to 21.63 weeks of permanent partial disability benefits at the rate of \$506.29 per week for a 10.3 percent impairment to the right arm. As of the date of this Order, all the weeks of permanent partial disability benefits, a total of \$10,951.05, are due and owing.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁸ Melhorn Depo. at 26-27.